IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 1026 OF 2003.

1. Maruti Ramchandra Jadhav,
   Age: 62, Occ.: Retired,
   Primacy Teacher/Pensioner.

2. Sou.Malati Maruti Jadhav,
   Age 52, Occ. Household.
   both residing at Devale
   Chaphavali, Tal: Sangameshwar,
   Dist. Ratnagiri. ... Appellants.

Versus.

Mrs.Minakshi Chandrakant Jadhav,
Age: 30, Occ.: Nil, residing at
Ambeshet, Taluka & Dist. Ratnagiri. ... Respondent.

Shri P.D.Dalvi for the Appellants.

Shri S.B.Shetye for the Respondent.

CORAM : ABHAY S.OKA, J.

Date on which arguments were heard. : 7th March, 2007.

Date on which judgment pronounced. : 25th April, 2007.

JUDGMENT.:

1. This appeal arises out of a dispute as regards the custody of the minor children. The Respondent is the mother of the minor children and the Appellants are the in-laws of the Respondent. The Respondent is the original Applicant in the Application for custody. The Respondent married to one Chandrakant Maruti Jadhav.

The said Chandrakant died on 23rd January 2000. The Appellants are the parents of the said Chandrakant. The Respondent and the deceased Chandrakant had three children Sagar, Sugandha and Tushar. The present age of Sagar is about 13 and the age of Sugandha is 11. The age of Tushar is 9 years. The custody of Sagar and Sugandha is with the Appellants and the custody of Tushar is with the Respondent.

2. According to the case of the Respondent few days after the demise of her husband, her brother and mother had visited her matrimonial home. According to her case, her father-in-law reluctantly allowed her to go with her mother. He allowed her to take the son Tuishar along with her. However, he did not allow her to take her two other children with her. Thereafter the Appellants declined to hand over the custody of Sagar and Sugandha to her. Therefore, the Respondent filed an application for custody. By the impugned Judgment and Order dated 17th June 2003, the trial Court has allowed the said application.

3. During the pendency of the Appeal, this Court passed an order for grant of access to the Respondent to meet the minor children. On 19th August 2004 when this Appeal came up before me in my chamber, the parties to the Appeal and the minor children were present in the

Chamber and I personally interviewed both the children. I passed an ad-interim order in the following terms:

> "3. On 19th September, 2004 at 11 a.m. the Appellants will take both the minor children to the place of Ms.Kalpalata Bhide and will allow the Respondent to meet the minor children. The Respondent will also keep her younger son present at that time. The Respondent will be permitted to meet the minor children for three hours. It is desirable that the Appellants impress upon both the minor children that they should have a dialogue with their mother who is the Respondent herein. Shri Dalvi learned Counsel appearing for the Appellants has agreed to assist the Court and to inform the Appellants accordingly."

4. On 17th February 2006, another learned Judge of this Court interviewed the children. The learned Judge referred to the order dated 2nd September 2004. The learned Judge directed the Appellants to take the minor children to the house of Kalpalata Bhide on 25th February 2006 at 11.00 a.m. and the Respondent was permitted to meet the children. The Respondent was also allowed to take the minor children out of the house for a short period for an hour or so. In the said order,

the learned Judge after interviewing the minor children has recorded that the children were not willing to go to the mother.

5. The learned Counsel for the Appellants submitted that the Appellants have been all throughout taking care of both the minor children and both the children are taking education. He submitted that considering the tender age of the minor children, it will be unjust to disturb the custody. The learned Counsel for the Respondent submitted that the Respondent-mother is the legal guardian of the children and therefore, she is entitled to the custody. He submitted that the Respondent is capable of looking after the children and she has been already looking after the younger son Tushar. He submitted that it is desirable that the younger son has the company of his elder brother and sister. He, therefore, submitted that no interference is called for.

6. On the date of hearing, the Appellant No.1 was present in the chamber and he assured the Court that he will take all possible care of both the children and will ensure that both of them get good education. I have perused the notes of evidence and the pleadings. Right from the year 2000, the minor children are in the custody of the Appellants. The present age of the minor

son is about 13 and the daughter is about 11. When I interviewed the children on 2nd September 2004, I found that both of them were not inclined to stay with the mother. Same is the impression recorded by the learned Judge (S.R.Sathe, J.) in order dated 17th February 2006. It is true that the dispute regarding the custody cannot be decided only on the basis of the views expressed by the children. Nevertheless it is certainly a factor to be considered.

7. Both the minor children are taking education. Both of them are of tender age. They have become used to the company of their grand parents. It is well settled law that the dispute regarding the custody of minor children cannot be decided only on the basis of the legal rights of the parties. The welfare of the minor children is the only consideration for deciding such disputes. It is true that the Respondent is the mother and legal guardian of the children. If at this tender age, the custody of the children is disturbed, it will have adverse effect on the children. Therefore, I am not inclined to uphold the order of the learned trial Judge granting custody of the minor children to the Respondent.

8. At the same time it is necessary to ensure that the children get used to the company of the mother and

their younger brother. The learned Counsel for the Respondent had suggested that if this Court is not inclined to maintain the order of custody, overnight access may be provided during the school vacations. During the course of arguments what I gathered was that till today on very few occasions the children had an opportunity to meet their mother during the last few years. In principle, in a given case, the order of overnight access or order of temporary custody can be passed. But in the present case this is not the stage at which such an order can be passed. The reason being, as of today, the children are not used to the company of their mother. After the minor children get used to meeting the mother, the said prayer can be considered.

9. It must be noted here that the Counsel appearing for the parties pointed out that Ms.Kalpalata Bhide at Ratnagiri has volunteered to help both the parties and at her place the Respondent was allowed to meet the minor children. The learned Counsel for the Appellant stated that even today the said Ms.Kalpalata Bhide is willing to help the parties by permitting them to meet the minor children at her place. Such a benevolent gesture on the part of Ms.Kalpalata Bhide is to be appreciated. For the time being I propose to permit the Respondent to meet the minor children at the house of Ms.Kalpalata Bhide on every second and fourth Sunday of

the month between 10 a.m.and 12 noon. It is desirable that the Respondent brings along with her younger son Tushar so that he also gets an opportunity to have company of his elder brother and sister. The Respondent will be entitled to take both the children out for a while. But she will have to return by 12.00 noon.

10. The orders regarding the custody of the minor children and the right of access are never final in the sense that the parties can always apply for modification of the orders in case of change in circumstances. At appropriate stage, the Respondent will be entitled to apply for custody of the minor children. If there is any difficulty in the arrangement made in this order for visitation rights, it will be open for the parties to apply to the District Court for appropriate directions. It will also be open for the Respondent to apply to the District Court after a period of six months from today for providing overnight access in school vacations or on holidays. The District court will decide such applications on its own merits. The Judgment will not be complete without recording appreciation of the approach adopted by the learned Counsel appearing for both the parties and the gesture on the part of Ms.Kalpalata Bhide.

11. Hence I pass the following order:

(i) The impugned judgment and order is quashed and set aside. Civil Miscellaneous Application No.43 of 2000 stands dismissed.

(ii) On the 2nd and 4th Sunday of every calender month, the Appellants will take the minor children Sagar and Sugandha to the place of Ms.Kalpalata Bhide at Ratnagiri at 10.00 a.m. The Respondent will be permitted to meet the minor children at the house of Ms.Kalpalata Bhide till 12.00 noon. It is advisable that the Respondent brings her younger son Tushar along with her to enable him to meet his elder brother and sister.

(iii) The Respondent will be entitled to take minor children out for a while, but she will have to come back by 12.00 noon.

(iv) In case Ms.Bhide has any difficulty on 2nd and 4th Sunday, parties will fix the day and time for grant of access as per the convenience of Ms.Kalpalata Bhide. The parties will ensure that minimum

inconvenience is caused to her.

(v) In case of difficulty in implementation of the aforesaid directions, parties are free to apply to the District Court for appropriate directions. It will also be open for the Respondent to apply after a period of six months from today to the District Court for grant of overnight access. It is also made clear that at appropriate stage it will be open for the Respondent to apply for custody of the minor children. If such applications are made, the District Court will decide the same on its own merits.

(vi) Parties to act on an authenticated copy of this order.

Judge.